

**[CAPTION]**

**MOTION TO EXCLUDE FIELD SOBRIETY TESTS (IND. R. EVID. 402, 403, 701, 702)**

The Defendant, by counsel, respectfully requests this Court to order the prosecutor, agents of the State, and all witnesses connected thereto to refrain from making any mention, either direct or indirect, to any field sobriety tests administered to Defendant in this case. In support of this Motion, the Defendant states the following:

1. On [insert date], the Defendant was arrested for the offense of driving under the influence of alcohol.
2. Prior to Defendant's arrest, the Defendant was required to submit to field sobriety tests, including a walk-and-turn test, gaze nystagmus, modified position of attention, one-leg-stand test, finger-to-nose, alphabet recitation and reverse counting.
3. The field sobriety tests which the Defendant was allegedly administered were not scientifically reliable, nor an accurate indicator of the Defendant's sobriety due to the physiological human factors and deviations from the required standards for the administration of said tests.
4. There has been no showing by the State of Indiana that the tests administered to the Defendant are scientifically reliable.
5. It is impossible to make a reasonable inference that a defendant who had difficulty performing the field sobriety tests is impaired due to alcoholic beverages. See "New Proof that Field Sobriety Tests are 'Failure-Designed.'" DWI Journal (February 1991, Volume 6, No. 2) (a study calling into question the validity and reliability of the traditional field sobriety tests) by Ronnie M. Cole and Spurgeon N. Cole.
  - a. A juror's common observations and experiences in life do not involve determining a person's alcohol impairment based on a contrived test such as the field sobriety

test.

b. The field sobriety tests do not involve the use of normal faculties such as seeing, walking, talking, judging distances, driving an automobile, making judgments or acting in emergencies, but instead involve abnormal physical activities and verbal performances.

c. There has never been established any correlation between inability to perform field sobriety tests and an inability to do all or some of the things included as part of normal faculties.

d. There is no evidence as to what, if any, portions of a field sobriety test are such that a juror could expect a person with normal faculties to satisfactorily perform the tests.

6. The field sobriety test evidence is inadmissible on the following legal grounds:

a. The evidence is irrelevant. Evid.R. 402.

b. The probative value, if any, is substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. Evid.R. 403.

c. The evidence is not scientifically reliable.

d. The evidence involves inadmissible opinion testimony. Evid.R. 701 and 702(b).

7. Based upon the foregoing, the results of the field sobriety tests allegedly administered to the Defendant cannot be deemed to be scientifically reliable and accurate and thereby preclude their admissibility in a trial of this cause.

8. The use of the field sobriety tests in the prosecution of the Defendant in this cause violates the Defendant's right to a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 12 of the Indiana Constitution and also violates the Defendant's right to equal protection under the law

under the Fifth and Fourteenth Amendments to the United States Constitution, in that said field sobriety tests are not scientifically and medically reliable as a test to determine the Defendant's sobriety. In addition, separate individuals will test differently on said field sobriety tests based on physiological functions associated with each individual as well as variation deviations from the accepted norm set by the United States Department of Transportation and the National Highway Traffic Safety Administration.

9. The use of improper prosecution tactics and methods has historically and traditionally been found to be a violation of due process when such tactics and methods have ultimately undermined the resolution of the question of guilt or innocence of an individual. See Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) (eyewitness testimony that is unreliable due to impermissible suggestive identification proceeding is improper and a violation of due process); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) (due process violation when the State uses unfair entrapment tactics to gain criminal convictions); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)) (due process violation where destruction by the prosecutor of evidence which tends to be exculpatory to the Defendant).

10. The field sobriety tests administered to the Defendant are further subject to the arbitrary, discretionary and capricious manner in which an arresting officer or law enforcement official requires an individual to perform the field sobriety tests.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court of an Order in Limine requiring the State of Indiana, agents of the State, and all witnesses connected thereto not to make mention of, refer to, or interrogate concerning the fact that the Defendant was allegedly

administered field sobriety tests and the results of the tests, and for all other relief just and proper in the premises.

(Signature)

## NOTE

**BUT SEE** Smith v. State, 751 N.E.2d 280 (Ind.Ct.App. 2001) (because field sobriety tests are not based on complex scientific principles, the State need not meet the requirements of Indiana Rule 702, but rather just establish the officer's training and experience in order to admit results of test).

Hinds v. State, 906 N.E.2d 877 (Ind.Ct.App. 2009) (unstandardized and uncertified field sobriety tests, such as the finger-to-nose and backwards count test-are admissible).

## REFERENCES

*Drunk Driving Defense* (5th Edition) by Lawrence Taylor, Section 4.04 (Field Sobriety Tests)

“Proof and Disproof of Alcohol-induced Driving Impairment Through Evidence of Observable Intoxication and Coordination Testing”. 9 Am. Jur. Proof of Facts 3d 459 (1990) (survey of issues in field sobriety tests).

## CASE LAW

People v. Loomis, 156 Cal.App.3d Supp. 1 (1984) (testimony regarding Defendant's blood alcohol level based on lateral gaze nystagmus tests inadmissible; the test had not gained general acceptance under Frye); Cf. People v. Joehnk, 35 Cal.App. 4<sup>th</sup> 1488, 42 Cal. Rptr.2d 6 (Cal. App. 4 Dist. 1995).

Cooper v. State, 761 N.E.2d 900 (Ind.Ct.App. 2002) (HGN results are admissible in Indiana and proper foundation for such evidence should consist of describing officer's education and experience in administering test and showing that procedure was properly administered).

Brown v. State, 915 N.E.2d 996 (Ind.Ct.App. 2009) (clarifying proper procedure for administering HGN test set forth in National Highway Traffic Safety Administration manual), *superseded by statute on other grounds*, State v. Bisard, 973 N.E.2d 1229 (Ind.Ct.App. 2012)

Ludington, “Horizontal Gaze Nystagmus Test: use in Impaired Driving Prosecution” 60 A.L.R. 4<sup>th</sup> 1129 (1988) (discussing case law).